RCRA-2002-0051-0014

HOGAN & HARTSON
L.L.P.

KENNETH M. KASTNER
PARTNER
(202) 637-5653
KMKASTNER@HHLAW.COM

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910
WWW.HHLAW.COM

February 21, 2003

VIA HAND DELIVERY

Ms. Ingrid Rosencrantz
Office of Solid Waste
U.S. Environmental Protection Agency
2800 Crystal Drive
9th Floor
Arlington, VA 22202

Re: Additional Background for Changes to Recycle Rules

Dear Ms. Rosencrantz:

On October 2, 2002, I submitted on behalf of several clients comments suggesting changes to the recycle rules to reflect the "continuous industrial process" recycling theme from the *Ass'n of Battery Recyclers, Inc. v. U.S. EPA* (ABR) decision. EPA discussed this decision and requested comments on it in its Federal Register notice at 67 FR 11251, 11252 (March 13, 2002). One comment we submitted proposed changes to the current rule at 40 CFR § 261.4(a)(18) regarding petrochemical recovered oil from associated organic chemical manufacturing facilities. The purpose of today's letter is to further clarify these proposed changes. Please include today's letter in the docket for the upcoming proposed rule along with the October 2, 2002 letter. We also urge EPA to include our suggestions in the upcoming proposed rule and to request comment on our suggestions.

All of the changes we suggest to the 40 CFR § 261.4(a)(18) exclusion for petrochemical recovered oil from an associated organic chemical manufacturing facility appear in the enclosure. I will discuss below each suggested change:

NAICS Code

Consistent with the Agency's plan to develop a new exclusion for continuous in-process recycling based on four-digit NAICS codes, we presume that the Agency will want to revise its current 40 CFR § 261.4(a)(18) exclusion to change the outdated four-digit SIC codes to the corresponding current NAICS code. In that

regard, our first suggestion is to change the petroleum refining SIC code 2911 to the corresponding NAICS code 3241.

SIC codes 2869, 2821, 2822 and 2865 are also referred to in current subsection (ii) of 40 CFR § 261.4(a)(18) regarding the definition of an "associated organic chemical manufacturing facility." Two NAICS codes (3251 and 3252) correspond to the four SIC codes (2869, 2821, 2822 and 2865) that are in the current rule at 40 CFR § 261.4(a)(18)(ii). Thus, the current rule should be revised to define an "associated organic chemical manufacturing facility" as "a facility where the NAICS code is 3251, 3252 or both ..."

Note that this change would delete the current requirement that one code (currently SIC code 2869) be the primary code for the chemical plant. There are two reasons for this: First, when the four SIC codes are collapsed into two NAICS codes, neither of the NAICS codes would be appropriate to designate as the primary code. Second, the current designation of SIC code 2869 as the primary SIC code of the chemical plant was likely misunderstood when adopted. The 2869 SIC code covers "industrial organic chemicals, not elsewhere classified (NEC)." As such, only industrial organic chemical plants that do not have a more specific SIC code would appear to qualify. For example, plants that manufacture plastics or resins (SIC code 2821) or synthetic rubber (SIC code 2822) could be argued not to qualify simply because their organic chemical manufacturing operations are covered by a specific SIC code. Of course, these plants can generate large volumes of hydrocarbons that can be used by a refinery to make petroleum products. It would make little sense that as a condition for qualifying for the exclusion, the co-located chemical facility must have a SIC code that is Not Elsewhere Classified (NEC). A NEC "catch-all" code should not be designated as the required "primary" code. To eliminate any potential confusion and align with the new NAICS system, it is appropriate to delete the requirement that one of the NAICS codes be the "primary" code.

Methyl Ethyl Ketone

As explained in our October 2, 2002 submission, under the current rule, recovered oil from co-located chemical manufacturing facilities cannot exhibit the D035 toxicity characteristic for methyl ethyl ketone (MEK). MEK is common in many organic manufacturing processes, and a petroleum refinery can readily process this MEK along with other hydrocarbons to produce valuable products.

Accordingly, we suggest that this rule be changed to allow recovered oil that exhibits the toxicity characteristic for MEK (waste code D035) to be subject to the exclusion.

Long-Term Commitment

We suggested in the October 2, 2002 comments that an "associated organic chemical manufacturing facility" could meet any one of three criteria: (1) co-located; (2) co-owned, *i.e.*, within the same corporate family; or (3) "integrated as reflected in a long-term commitment where the petroleum refinery to which the oil being recycled is returned also provides hydrocarbon feedstock to the organic chemical manufacturing facility." This third alternative would recognize that where there is a long-term, integrated commitment between a petroleum refinery and an organic chemical manufacturing facility, the recycling amounts to continuous recycling consistent with the intent of the *ABR* decision.

An example of an integrated long-term commitment is a petroleum refining company that has two 10-year gas supply contracts, both with rights of renewal. One contract is with a co-located chemical plant owned by a different company, and the second is with a non-co-located chemical plant owned by a different company. The chemical plants use part of the gas stream from the refinery to produce ethylene. Under the current exclusion at 40 CFR § 261.4(a)(18), the co-located chemical plant is able to return its secondary hydrocarbon stream to the refinery for use as a fuel gas, and such returned material is excluded from regulation. The non-co-located chemical plant, however, cannot take advantage of the exclusion to send its residual hydrocarbon stream back to the refinery as a fuel gas, since it is not co-located.

In both cases, the 10-year contract represents a carefully forged agreement between two merchants that have valuable raw materials to provide to each other. The contract in all respects resembles a reciprocal supply contract, not a waste treatment agreement. Where such long-term commitments exist, the chemical plant should not have to be co-located to have the recovered oil originating from its plant excluded from RCRA.

Corporate Family

Our final suggestion in the October 2, 2002 comment letter was to include in the definition of an "associated organic chemical manufacturing facility" a situation where the chemical manufacturing facility and the petroleum refinery are part of the same corporate family. As explained in those comments, when the two entities are in the same corporate family, EPA should have a high level of confidence that legitimate recycling of recovered hydrocarbons is occurring since neither party can effectively disclaim responsibility if the recycling were to be illegitimate. Further, such recycling represents corporately-planned integration of operations consistent with the *ABR* decision to promote continuous recycling in the same industry, or in this case, within the same company.

This suggested change raises questions as to what is meant by "part of the same corporate family." We suggest a simple test such as "a member of the corporate family is any entity where the corporation and its affiliates own 50% or more the entity." This is a simple, implementable test that ensures that the corporate family consists of entities that are controlled by the corporation.

We appreciate your consideration of these additional comments and clarifications.

Respectfully submitted,

Kenneth M. Kastner

Enclosure
cc (w/enclosure):
Ms. Charlotte Mooney (via e-mail)
Mr. Matt Straus (via e-mail)

261.4(a)*(18) Petrochemical recovered oil from an associated organic chemical manufacturing facility, where the oil is to be inserted into the petroleum refining process (~~SIC~~**NAICS** code ~~2911~~**3241**) along with normal petroleum refinery process streams, provided:*

(i) The oil is hazardous only because it exhibits the characteristic of ignitability (as defined in §261.21), ***toxicity for methyl ethyl ketone (§261.24, waste code D035),*** *and/or toxicity for benzene (§261.24, waste code D018); and*

*(ii) The oil generated by the organic chemical manufacturing facility is not placed on the land, or speculatively accumulated before being recycled into the petroleum refining process. An "associated organic chemical manufacturing facility" is a facility where the ~~primary SIC code is 2869, but where operations may also include SIC codes 2821, 2822, and 2865;~~***NAICS code is 3251, 3252 or both,*** *and is:* ***(1)*** *physically co-located with a petroleum refinery;* ~~*and*~~***(2) integrated as reflected in a long-term commitment*** *where the petroleum refinery to which the oil being recycled is returned also provides hydrocarbon feedstocks to the organic chemical manufacturing facility****; or (3) the chemical manufacturing facility and the petroleum refinery are part of the same corporate family****. "Petrochemical recovered oil" is oil that has been reclaimed from secondary materials, (i.e., sludges, byproducts, or spent materials, including wastewater) from normal organic chemical manufacturing operations, as well as oil recovered from organic chemical manufacturing processes.*